85 - 1899

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE ~~UNITED~~ STATES

OCTOBER TERM, 1985

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

JOHN MURCKO, Esq.
506 - 15th Street
Suite 500
Oakland, CA 94612
(415) 465-2241

Attorney for Petitioner

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UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

Appeal No. 85-1904

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

DECIDED: September 18, 1985

Before MARKEY, Chief Judge, COWEN, Senior Circuit Judge, and BALDWIN, Circuit Judge.

BALDWIN, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board sustaining petitioner's removal for absence without leave and failure to request leave in accordance with established procedures is affirmed.

OPINION

Petitioner's arguments are adequately treated in the board opinion dated Septem-

ber 24, 1984. We affirm on the basis of that opinion.

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

Appeal No. 85-1904

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case.

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart,
Clerk

Dated: February 27, 1986

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BLANCHE A. DAVID

v.

DEFENSE LOGISTICS AGENCY

Decision No. SFO7528410811
Date: September 24, 1984

INTRODUCTION

Blanche A. David, (appellant) appeals her removal as a Procurement Clerk (typing) by the Defense Logistics Agency (agency) for absence without leave (AWOL) and failure to request leave properly. For the reasons stated below, the agency action is affirmed.

JURISDICTION

The Merit Systems Protection Board (Board) has jurisdiction over appeals like this one involving the removal of employees who are non-probationary and in

the competitive service. 5 U.S.C. sections 7511-13 and 7701.

FACTS, LAW, ANALYSIS & FINDINGS

Three distinct elements must be shown in any conduct-based adverse action like this one: (1) that the alleged conduct occurred; (2) that there is a nexus between the conduct and the efficiency of the service, that is, there is a need for some disciplinary action; and (3) that the particular penalty imposed is reasonable. Douglas v. Veterans Administration, 5 MSPB 313, 329-330 (1981). These three elements will be discussed individually below along with pertinent facts, law and analysis,

Occurrence of Conduct

The agency removed the appellant effective May 18, 1984, by decision letter dated May 3, 1984 for AWOL between the period December 1, 1983 until March 7, 1984 (the date of the notice of proposed removal). Some background is necessary.

Appellant last reported for work with the agency on May 13, 1983. She was on leave the week of May 16, 1983. The agency next heard about the appellant on June 7 or 8, 1983, when it received a telephone call from an unidentified individual who indicated that appellant was hospitalized and would be unable to return to work. The caller refused to leave a name, telephone number or any other information.

Thereafter the agency made numerous, unsuccessful attempts to contact the appellant and to obtain from her the reason that she was not reporting for work.

For example, on June 19, 1983, appellant's supervisor wrote to her home, enclosed an SF-71 and self-addressed envelope and requested that appellant respond; on August 8, 1983, another supervisor again wrote to appellant, enclosed a SF-71 and self-addressed envelope and requested information relative to appellant's health,

expected return to duty and appellant's wishes with respect to accumulating paychecks. Similar unsuccessful attempts were made by the agency on August 23, 1983, October 27, 1983, November 16, 1983, November 25, 1983, and December 5, 1983.

Indeed the only responses from or about the appellant between June 8, 1983 and the notice of proposed removal in March 1984 were: an SF-71 dated August 8, 1983, bearing appellant's signature and requesting sick leave from May 16, 1983 to an unknown date in the future which did not contain as requested by the agency a doctor's statement or prognosis; a telegram received November 8, 1983, from appellant asking that the agency mail certain compensation forms to her[1]; another telegram dated November 21, 1983 from appellant indicating

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1. This request was complied with by the agency through its November 16, 1983 letter to appellant.

that she intended to file compensation claim forms and requesting that her leave status be changed from sick leave to leave without pay[2]; a telephone call on November 29, 1983 from a woman who refused to identify herself and who said that appellant would be having surgery on November 30, 1983; another telephone call on November 29, 1983 from a nurse in a doctor's office who said she was trying to confirm appellant's hospital appointment.[3]

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2. This was responded to by the agency in its November 25, 1983 letter, in which the agency declined to honor the request for sick leave or leave without pay since it had not received the requested medical certification or any information concerning appellant's status.

3. At the hearing, appellant indicated also that she had submitted a June 2, 1983 SF-171 requesting 112 hours of sick leave, a September 8, 1983 SF-171, and a September 8, 1983 letter from her doctor describing her medical condition and estimating that she could return to work in January 1984. The agency has stated credibly that it did not receive these documents. I would also note that after the time that these documents were purportedly submitted the agency on several occasions informed the appellant that it had not yet been provided with medical certification and included SF-171's which the appellant did not return.

Despite the agency's inability to obtain from appellant the necessary requests for leave along with supporting documentation, it carried the appellant in a sick leave status up until December 1, 1983. At that point she was placed in an AWOL status. Even after that time, however, the agency attempted, again unsuccessfully, to communicate with appellant and obtain the necessary SF-71 and requested documentation.

The agency proposed appellant's removal by letter dated March 7, 1984. Thereafter, a letter signed by appellant was forwarded from the agency's Los Angeles offices and considered by the deciding official as the equivalent of a written response.[4] Again, the agency removed appellant effective May 18, 1984 by decision letter dated May 3, 1984.

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4. This letter indicated that appellant intended to file a claim under the Federal Tort Claims Act, acknowledged receipt of the proposed removal and made various other claims concerning the proposal's unconstitutionality and unlawfulness.

Appellant appealed timely to the Board and requested a hearing. That hearing was held July 19, 1984 and five days thereafter the record was closed.[5]

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5. Late in the afternoon the day before the hearing an attorney representing the appellant phoned the undersigned presiding official and requested a continuance. He stated that he had just had the opportunity to meet with the appellant, that neither he nor she were prepared to proceed with the hearing and that the appellant appeared ill. No specifics concerning appellant's illness were provided. That motion for continuance was renewed the morning of the hearing by the appellant who for the most part stated that a continuance was necessary in order that she have her case presented by an attorney. Appellant's motion was denied on the basis that it was made at the last minute without any showing as to why the appellant was unable to contact the presiding official or the agency previously and without any showing that the appellant was unable because of physical problems to proceed at the time of the hearing. In that regard, I note that there is evidence that the agency attempted unsuccessfully to contact the appellant in order to fulfill obligations imposed by the prehearing order. Similar difficulties were experienced by the undersigned presiding official who attempted to contact the appellant to determine if she intended to appear at the hearing when she did not meet any of those obligations. Likewise, while the appellant seemed slow in moving about, she expressed herself quite capably, had no apparent problems with comprehension or eyesight and appeared unwilling to proceed largely because she did not have an attorney. There is no indication that appellant was diligent in

In relation to the agency's AWOL charge and the charge that appellant failed to request leave in accordance with established procedures, the agency must prove the occurrence of an unauthorized absence, that there was no leave status except AWOL which was appropriate and that the appellant was aware of the agency's leave regulations but refused to follow them. McDonough v. U.S. Postal Service, 4 MSPB 441 (1980), aff'd 666 F.2d 647 (1st Cir. 1981); and Bavier v. Department of Transportation, 5 MSPB 73 (1981). While an agency is required to grant sick leave in some circumstances (not applicable here), an employee must support any sick leave request with acceptable evidence and for absences in excess of three work days, must submit a medical certificate or an administratively acceptable

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attempting to obtain such services. See Daniells v. Department of the Treasury, MSPB Docket No. AT07528110659 (January 20, 1983) and Townsend v. Department of Agriculture, MSPB Docket No. DC07528110549 (December 29, 1982).

employee certification. 5 C.F.R. Sectic 630.401 and 403; Master Agreement, Defense Logistics Agency and DLA Council of Locals, April 1983, Article 25, Section 2; and Zeiss v. Veterans Administration, 7 MSPB 516 (1981).[6] Also, administrative leave is grantable only in the agency's discretion and only in instances where the agency can expect an employee to return to duty and where the granting of such leave offsets such factors as the encumbrance of the position. Federal Personnel Manual, Chapter 630, Subchapter 12.

The probative evidence in the instant appeal shows that the appellant was scheduled for duty during the time charged, that she did not report, that the agency informed appellant that medical certification was needed on numerous occasions and

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6. Of course, the Board will enforce agency leave regulations to include those contained in a collective bargaining agreement. Geisler v. Department of Transportation, 3 MSPB 367 (1981).

that the appellant failed to comply with the agency's request.[7]

The agency has proven by a preponderance of the evidence that the appellant was AWOL between the period December 1, 1983 to March 7, 1984 and that she failed to follow regulations in requesting leave.[8]

The Nexus Between the Conduct and the Efficiency of the Service

The conduct charged must impair the efficiency of the service. E.g., Gallagpher

7. The agency evidence shows that it properly exercised its discretion in not putting the appellant in leave without pay status since it could not afford to encumber the position in that way.

8. While the appellant has not raised this matter, I would be remiss if I did not address the question as to whether the agency had an obligation to file for disability retirement on appellant's behalf. In my view, the agency had no such obligation since it did not know and had no reason to know on the basis of the evidence before it that the appellant was disabled from performing her job or that she was mentally incompetent to file an application on her own behalf. Brink v. Veterans Administration, 4 MSPB 419 (1980); and Rodriguez v. Department of the Army, 10 MSPB 262 (1982). Indeed, even at the present time there is no evidence of such mental inability or incapacity to perform the duties of the position. See new regulations at 49 Red.Reg. 1328 (1984).

v. U.S. Postal Service, 6 MSPB 482 (1981). Clearly, absence from work interrupts the efficiency of the service. E.g., Chiaverini v. United States, 157 Ct.Cl. 371 (1962). Accordingly, I find a direct nexus between the appellant's conduct and the efficiency of the service.

The agency has established by a preponderance of the evidence that "some punishment" was appropriate. I will now discuss whether the particular punishment - removal - promotes the efficiency of the service.

The Reasonableness of the Penalty

As explained in Douglas at 332, the Board's role in evaluating the reasonableness of an agency imposed penalty is to determine after a responsible balancing of the relevant factors, whether the agency decision comes "within tolerable limits of reasonableness." To assist in that determination, the Board in Douglas at 333, pro-

vided a list (not necessarily exhaustive) of the generally recognized mitigation and aggravating factors which should be considered. The factors relevant in the instant appeal include the nature and seriousness of the offense, supervisory confidence in the appellant's ability to perform assigned tasks, the clarity with which the appellant was on notice of the rules violated, her past work and conduct record, and her potential for rehabilitation.

Appellant's offense was serious, particularly in view of the five and a half month length of the AWOL and her absence for the nearly seven months previous. E.g. Huston v. Department of the Air Force, 6 MSPB 223 (1981). And there is little doubt, judging from the averments of appellant's supervisors that they have lost confidence in her ability to appear at work and perform the duties assigned to her.

Also, appellant was clearly on notice

of leave requirements since the agency informed her in numerous correspondence and advised her of the penalty (possible removal) for failure to comply. Likewise, appellant's failure to comply in the face of numerous opportunities reveals that she has little potential for rehabilitation.

I am mindful that appellant is a long term employee who in the past has performed her job well and had no attendance problem. These factors are insufficient to outweigh the seriousness of this lengthy AWOL offense.

Further, I have also considered that the appellant for at least part of the AWOL period was undergoing medical treatment. However, there has been no showing that appellant's health problems prevented her from complying with the somewhat simple procedure of presenting sufficient SF-171s and medical documentation if she was indeed too ill to appear for work.

In view of my analysis of the appropriate factors I find that the agency has proven the facts underlying its penalty by a preponderance of the evidence and has shown that the penalty imposed was within tolerable limits of reasonableness for the offenses sustained.

AFFIRMATIVE DEFENSE

Even though the agency has established the occurrence of the conduct and that removal was reasonable, the agency action must be set aside if the appellant can show that it was "based" on a prohibited personnel practice. 5 U.S.C. Sections 7701 (c)(2)(B); and Stewart v. United States Postal Service, 8 MSPB 427 (1981). In that regard appellant claims that the agency removed her in retaliation for providing affidavit and other support to another employee engaged in litigation against the agency and for disclosing information during that proceeding which appellant

reasonably believed evidenced a substantial danger to public health or safety.[9]

To prove such a claim, appellant has the burden to show that (1) she was engaged in a protected activity; (2) she was treated adversely by the agency; and (3) there is a causal link between the protected activity and the adverse action. Valerino v. Department of Health and Human Services, 7 MSPB 347 (1981). Even assuming appellant was engaged in a protected activity[10] and that the agency adversely treated her (removal) she has not shown a causal link between the protected activity and the adverse action. Indeed, despite appellant's long absence the agency did not even put the appellant in an AWOL status until December 1, 1983 and did not take action against her until March 7, 1984. Before

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9. In this other proceeding, appellant provided evidence concerning alleged environmental health hazards which existed at the agency facility.

10. See e.g., 5 U.S.C. 2302 (b)(8) and (9).

that time she was given numerous opportunities to conform her obviously improper conduct to agency regulations. She did not do that and the agency removed her for AWOL and failure to comply and not because of any participation in a law suit or because of any disclosure of information.

The appellant has failed to prove by a preponderance of the evidence that the agency retaliated against her.[11]

CONCLUSION AND DECISION

The agency has established by a pre-

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11. It is unclear whether the appellant is making a claim of handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. Section 791. In any event, appellant has not shown that she is handicapped, that the agency knew or should have known of any handicap or that the disciplinary action taken against her was because of her handicap. Stalkfleet v. U.S. Postal Service, supra; Henderson v. U.S. Coast Guard, MSPB AT07528010362 (January 21, 1983); and Webb v. U.S. Postal Service, 9 MSPB 749 (1982). Similarly, appellant's generalized claims in her petition for appeal concerning the unconstitutionality of the agency action and other asserted violations are unsupported by evidence.

ponderance of the evidence that the appellant committed the conduct charged and that removal is a reasonable penalty for such conduct. Further, the appellant has failed to show by a preponderance of the evidence that the agency committed a prohibited personnel practice.

The agency's removal decision is AFFIRMED.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with the Secretary, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, in accordance with 5 C.F.R. Section 1201.114 and .115. The petition for review must be filed on or before October 29, 1984, and must set forth objections to the initial

decision, supported by references to applicable laws, regulations, and the record.

This initial decision will become a final decision of the Board on October 29, 1984, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. Sections 1201.113 and .117.

If the appellant wishes to contest the Board's final decision on the issue(s) of discrimination (s)he has raised, (s)he may obtain administrative review of the (those) issue(s) alone by filing a petition for review with the Equal Employment Opportunity Commission (EEOC) within 30 days of the date the initial decision becomes final. 5 U.S.C. Sections 7701(b)(1) and 7702(b)(3)(B).

If the appellant wishes to contest the Board's final decision on the issue(s) of discrimination and has not filed a petition with EEOC, (s)he may obtain judicial review of all issues by filing a petition with an

appropriate United States District Court within 30 days of the date the initial decision becomes final. 5 U.S.C. Sections 7702(a)(3) and discrimination which were brought before the Board under 5 U.S.C. Section 7702, appellants have the right to request the court to appoint an attorney to represent them. 42 U.S.C. Section 2000e-5(f)(2).

If the appellant chooses not to contest the Board's final decision on the discrimination issue(s), (s)he may obtain judicial review of the other issues by filing a petition with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition must be received by the Court within 30 days of the date the initial decision becomes final. 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD:

SAMUEL A. VITARO
PRESIDING OFFICIAL

FROM MERIT SYSTEMS PROTECTION BOARD
UNITED STATES GOVERNMENT

MEMORANDUM

Dated: 2 June 1978

TO: DCRL-GFP

FROM: DCRL-GFP (LTC MC GOWAN/69537/pjr)

SUBJECT: Potential Problem with Air Circulation System

Attached is a medical statement from Letterman Army Medical Center that our building air conditioning bstem may contain allergen thermophilic actinomyces. It is requested that this matter be referred to the GSA for appropriate investigation/ action.

E.B. MC GOWAN
LTC, ORDC, USA
Chief, Production
Division

Encl.

FROM MERIT SYSTEMS PROTECTION BOARD

DEPARTMENT OF THE NAVY
Letterman Army Medical Center
Presidio of San Francisco, CA 94129

26 May 1978

RE: SCOTT, DORIS

MEDICAL STATEMENT

I began seeing Ms. Scott on 16 May 1978 for multiple medical complaints. At that time she stated that since beginning work in a new building at the same job and with the same co-workers in July 1977, she has had frequent episodes in which she develops over the period of 1-2 days a feeling of nasal congestion, dry cough, chest congestion, and general malaise. The symptoms persist through the time she works in the building during the week and then disappear following her being home from work on the weekend or over holidays. Within 1-2 days of returning to work she develops the same symptom complex. She states that several co-workers have told

her that they have had the same symptoms since moving into the present building although not to the same degree as she has had them.

Ms. Scott's symptoms are strongly suggestive of contact with an air-borne allergen, thermophilic actinomyces, which lives in some air conditioning and heating systems. I have arranged for Ms. Scott to see a pulmonary specialist in regard to the symptoms, and this appointment has been made for 28 June 1978. In the interim I feel that it is medically indicated that Ms. Scott be transferred to a place of employment outside the current building in which she is working or be granted a leave of absence for medical reasons until her symptoms are further investigated. Ms. Scott is not, specifically, medically disabled at this time and should be able to continue to work at the same or similar duties at which she is employed, but

should simply do so in a building geographically removed from the one in which she is experiencing her symptoms.

STEPHEN F. WALLER, M.D.
Major, MC
Neurology Clinic

FROM MERIT SYSTEMS PROTECTION BOARD

Dated: 25 February 1983

DCRL-GFB

SUBJECT: Improvement of Air Quality at DCASMA, San Francisco

Mr. John C. Hackman
P.B.S. Operations Branch
General Services Administration
555 Battery Street, Room 503
San Francisco, CA 94111

Dear Mr. Hackman:

Reference: Building survey conducted by GSA Representative, Mr. Hackman, on Friday, 18 February 1983.

To further supplement our discussion on Friday concerning air conditioning problems at DCASMA, San Francisco Headquarters Building, 1250 Bayhill Drive, a copy of a complaint and petition which I was made aware of after your visit is enclosed. I believe this is a good example of the type of employee complaints we are receiving and it also identifies the physical ailments employees are experiencing.

It is suggested that GSA request the lessor to inspect the air conditioning system in the building for the purpose of providing better circulation.

Sincerely,

R.I. IVERSON
Captain, SC, USN
Commander

_____Concur
DCRL-GFA ELAINE F.
COURTIER

PETITION TO IMPROVE AIR QUALITY AT DCASMA-SF

We, the undersigned, request that the air ventilation system in the building at 1250 Bayhill Drive, be inspected and adjusted to provide better circulation. It is our contention that the incidence of headaches and related sinus problems are caused by the lack of adequate air circulation and its quality. Work productivity and morale are directly affected by the poor quality of this office's atmosphere.

Thomas J Turnet	DCRL-GFCB/85
Pat Sancinito	DCRL-GFCA/85
Jean Lowe	DCRL-GFCA/84
Fran Zielke	DCRL-GFCA/84
[illegible]	DCRL-GFCA/89
Irma Elia	DCRL-GFCA/84
Robert Huth	DCRL-GFCA/89
[illegible]	DCRL-GFCA-87
Glenn Benson	DCRL-GFCA/84
Marge Osborne	DCRL-GFCA/87
[illegible]	DCRL-GFCA/85
R. Tomsett	DCRL-GFCA/87
Leigh Barker	DCRL-GFCB/88
Yvonne D Evans	DCRL-GFCB/83
Grace Putman	DCRL-GFCB/88
Georgia Moore	DCRL-GFCB/85
Carl Thornhill	DCRL-GFCB/85
[illegible]	DCRL-GFCB
Cleo Mavredes	DCRL-GFCB

29a

BEST AVAILABLE COPY

COPY

Form Approved
OMB No. 53-R0066

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
CHARGE AGAINST AGENCY

INSTRUCTIONS: File an original and 4 copies of this Charge, together with one copy for each additional party named, with the appropriate Regional Director, Federal Labor Relations Authority. After filing the Charge, serve a copy of the Charge on each party against which the Charge is made. If more space is required for any item, attach additional sheets, numbered according to the item to which it pertains.

DO NOT WRITE IN THIS SPACE

CASE NO.
9-CA-30109

DATE FILED
Dec 29, 1982

(a) (Including names and addresses) of those upon whom service has been made should accompany the Charge.

ACTIVITY AND/OR AGENCY AGAINST WHICH CHARGE IS MADE

A. NAME OF ACTIVITY AND/OR AGENCY
DoD, DLA, DCASR-Los Angeles, DCASMA-SF, ET AL. AT SAN BRUNO, CALIFORNIA 94066

B. ADDRESS (Street and Number, City, State and Zip Code)
11099 South La Cienega Blvd., Los Angeles, California 90045

C. PERSON TO CONTACT, TITLE
Ms. Mary Ryabik, Labor Relations Specialist

D. PHONE NO.

E. NO. OF EMPLOYEES EMPLOYED
approximately 3500

F. IF CHARGE IS MADE AGAINST AN ACTIVITY, NAME THE AGENCY OF WHICH THE ACTIVITY IS A PART DCASR-Los Angeles, Et Al.
Defense Logistics Agency

THE ABOVE-NAMED ACTIVITY AND/OR AGENCY HAS ENGAGED IN VIOLATIONS OF 5 U.S.C. 7116(a), SUBSECTION(S) (1) AND (5) and (8).
(List Subsection(s))

BASIS OF THE CHARGE (Give a clear and concise statement of the facts constituting the alleged unfair labor practice and the date and place of occurrence of the particular acts.)
This unfair labor practice case involves Ms. Irene D. Parodi, a person and employee whose employment in DoD, DLA, DCASR-LA, DCASMA-SF, ET AL. at San Bruno, Ca. 94066, has ceased because of 7116(a)(1)(5) and (8), 5 U.S.C. unfair labor practices committed by aforesaid parties against Ms. Parodi and her Exclusive Representative (AFGE Local 2723) without their knowledge commencing approximately on June 1, 1979 and thereafter and continuing to October 21, 1982, the date the undersigned discovered a news report in the local newspaper concerning Ms. Parodi, her plights and that she suffers from an occupational illness, and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority, and has and continues to be deprived of her rights to collect unemployment insurance benefits, disability insurance benefits under social security law and workers' compensation benefits for suffering a disease proximately caused by the employment by reasons of aforesaid parties gross failures to counsel Ms. Parodi over the occupational illness, etc. , their failures to prepare and forward appropriate paperwork, etc. to Ms. Parodi, as well as to prepare and forward Form CA-2 in her behalf to the Office of Workers' Compensation

INFORMATION CONCERNING ALTERNATIVE PROCEDURES USED FOR RESOLUTION OF MATTERS COVERED BY THIS CHARGE:
HAS THE SAME FACTUAL SITUATION OR ISSUE COVERED BY THIS CHARGE BEEN RAISED --

A. UNDER A GRIEVANCE PROCEDURE? ☐ YES ☒ NO

B. WITH THE FEDERAL SERVICE IMPASSES PANEL, THE FEDERAL MEDIATION AND CONCILIATION SERVICE, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE MERIT SYSTEMS PROTECTION BOARD OR THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD FOR CONSIDERATION OR ACTION? ☐ YES ☒ NO

C. WITH THE FEDERAL LABOR RELATIONS AUTHORITY UNDER THE NEGOTIABILITY PROCEDURE? ☐ YES ☒ NO

IF "YES," INDICATE UNDER WHICH PROCEDURE YOU SELECT TO PROCEED (Check one)
☐ UNFAIR LABOR PRACTICE PROCEDURE ☐ NEGOTIABILITY PROCEDURE

DECLARATION

A. FULL NAME OF PARTY FILING CHARGE (If labor organization, give local name and number, national or international, and affiliation, if any)
Blanche A. David, AFGE Steward, LOCAL 2723, Affiliated With The AFL-CIO

B. ADDRESS (Street and Number, City, State and Zip Code)
P. O. BOX 426, San Bruno, California 94066

C. PHONE NO.
415/876-9505

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

BY (Type or print below the name of the representative or person filing the Charge)
Blanche A. David, AFGE Steward, LOCAL 2723

SIGNATURE
Blanche A. David

BLANCHE A. DAVID, AFGE STEWARD, LOCAL 2723

ADDRESS (Street and Number, City, State and ZIP Code)
P.. O. BOX 426, SAN BRUNO, CALIFORNIA 94066

TITLE	PHONE NO.	DATE
AFGE STEWARD, LOCAL 2723	415/876-9505	December 27, 1982

FLRA Form 13
(Rev. 2-80)

31a

BEST AVAILABLE COPY

FROM MERIT SYSTEMS PROTECTION BOARD

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
San Francisco District Office
10 United Nations Plaza
San Francisco, CA 94102

14 June 1983

Director, Equal Employment Opportunity
Defense Logistics Agency
ATTN: KLA-KE
Cameron Station
Alexandria, VA 22314

Re: Helen B. Bellew and Elisa Fernandez vs. Defense Contract Administration Services Management Area, San Francisco
EEOC Cases No. 091-83-X0097 and 091-83-X0098

Dear Sir or Madam:

Transmitted herewith are two copies of the Recommended Decision on the discrimination complaints of Helen B. Bellew and Elisa Fernandez, employees of the Defense Contract Administration Services Management Area, San Francisco. The two cases were consolidated for purposes of the hearing and the Recommended Decision.

Also enclosed please find the case

file and correspondence file for each case, and a folder containing the exhibits admitted in evidence at the hearing and post-hearing.

The original copy of the transcript is enclosed. One copy has been forwarded to the EE Manager, Defense Contract Administration Services Region, Los Angeles. That office has agreed to make two additional copies and forward them to you. Unfortunately, the Court Reporter furnished only an original and one copy of the transcript. (But see page 80 of the transcript).

At the time of your decision on this matter, a copy of this Recommended Decision, and a copy of the transcript, must be forwarded to each complainant, separately. Additionally, a copy of your decision and this Recommended Decision should be forwarded to Ms. Bellew's representative. 29 CFR 1613.221.

I would appreciate receiving a copy

of your final decision(s) on these cases.

Very truly yours,

Ann Wansley, Attorney
Examiner

Enclosures

cc (w/o enclosures):

Helen B. Bellew
Elisa Fernandez
Blanche A. David
Jenifer B. Smith
Marie R. Seckler

FROM MERIT SYSTEMS PROTECTION BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7671

IRENE D. PARODI, Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent,

and

OFFICE OF PERSONNEL MANAGEMENT,
Intervenor-Respondent.

AFFIDAVIT OF BLANCHE DAVID

I, BLANCHE DAVID, under penalty of perjury declare and say:

1. I am over the age of 18 years, I am a resident of California, and I am not a party to the above-entitled action.

2. I am employed at the Defense Logistic Agency, San Bruno, California. My job at the DLA is that of senior research clerk. I am familiar with the facility, including the main contract room and the computer room.

3. I have reviewed the job description of the position offered MRS. PARODI, which is marked Exhibit "A", attached hereto and incorporated herein by this reference. The position is that of "senior research clerk", which is the same as my job. I am therefore highly qualified to evaluate the responsibilities of that job.

4. Although MRS. PARODI has been assigned to the computer room, the job will require MRS. PARODI to spend most of her time away from her desk and in the large contract documents room where she was assigned before. The job requires that she meet with ACOs throughout the building. Her work space is therefore approximately 29,000 square feet, none of which is smoking-restricted. She must review files and contracts, all of which are located in the larger contract documents room.

5. It is impossible to perform the job of research clerk usefully or effi-

ciently by staying in the computer room. It is my opinion that MRS. PARODI would necessarily spend at least 3-to-4 hours per day in the main working area where the smoky air makes her sick.

6. The large contract documents room has very bad air quality. Many of the employees and supervisors smoke. The issue of smoking is very sensitive, and any employee who asks a supervisor to quit smoking risks receiving a poor job report.

7. We have been in contact with the health and safety officers regarding the ventilation and air conditioning in the building, but nothing has been done to improve the same since MRS. PARODI left work in 1979.

8. The position of research clerk is a "dead-end" job. I have been in the position since 1977, when I was demoted pursuant to a Reduction In Force notice, and I have been a GS-5 ever since. In fact, I had been

promised to be promoted to a GS-7 as far back as 1968. The research clerk position offers no opportunity at advancement, and I expect that I will never receive a promotion and will retire a GS-5.

By contrast, a procurement clerk position offers the possibility of advancement, in many cases all the way to GS-12.

I certify and declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters I believe it to be true. I certify and declare under penalty of perjury that this Affidavit is executed on the 12th day of January, 1983.

BLANCHE DAVID

State of California)
County of San Mateo) ss

Subscribed to and sworn before me this 12th day of January, 1983.

Notary Public for the
State of California

FROM MERIT SYSTEMS PROTECTION BOARD

DAVID L. MACKLER, M.D.
A Professional Corporation
Internal Medicine
4141 Geary Boulevard
San Francisco, CA 94118

September 9, 1983

TO WHOM IT MAY CONCERN:

RE: BLANCHE DAVID

The above mentioned patient has been under my care since June 3, 1983 when she was hospitalized for extensive, severe pneumonia.

She was almost blind in both eyes by cataracts. The one in the right eye was removed in July 1983.

In addition, the patient is being treated for severe osteoporosis which has caused lordosis of her thoracic spine.

Her lung condition is slowly improving, and she is to have the cataract in her left eye removed in October 1983. Following cataract surgery, it is estimated that

Mrs. David will not be able to return to work until January 1984.

Very truly yours,

DAVID L. MACKLER, M.D.

DLM/jhp

RESPONSIBLE PARTY INFORMATION

Account ID: 11021
DAWYDIAK,BLANCHE D
2826 TIBURON WAY
BURLINGAME, CA. 94010

Acct Type....Priv....Private pa
Telephone....xxx-xxx-1192
Ref #.....0
Referral.....

PRIMARY INSURANCE

Type.....4 commercial
Carrier...Commercial Insurance
Insured...DAWYDIAK,BLANCHE
Policy....MUTUAL OF OMAHA
Sig Date..062683
Assgn.....Y

SECONDARY INSURANCE

Type.....
Carrier...
Insured...
Policy....
Sig Date..
Assgn.....

PATIENT 1 INFO

DAWYDIAK,BLANCHE D
Sex.....F
DOB.....101719
Assgn Dr..JWK
Ref #.....0

Relation 1..SELF
Relation 2..
Medicaid ID.

MEDICAL DATES

Onset of Ill.....
1st Consulted.....062083
Hospital Adm.....113083
Hospital Dis.....120283
Start Part Dis....
End Part Dis.....
Start Ttl Dis.....113083
End Ttl Dis.....033084
Return to Work....040184

MEDICAL INFO

Employment Related..n
Auto Accident.....n
Other Accident.....n
Similar Symptoms....n
Outside Lab Work....n
EPSDT.....n
Family Planning.....n
Emergency.....

FINANCIAL STATUS

Budget Pymt..... 0.00
Last Visit.....120183
Last Billing.....010384
Last Payment.....120983
YTD Payments..... 0.00

Account Balance....	0.00
Current.....	0.00
31 - 60 Days.....	0.00
61 - 90 Days.....	0.00
91 - 120 Days.....	0.00
> 120 Days.....	0.00

TRANSACTION HISTORY

SERV DATE	POST DATE	PATIENT NAME	DR	FS	TRNS CODE	DESCRIPTION	DX/REF	AMOUNT	S
						Beginning Balance.....		*0.00	
062083	062083	BLANCHE D	01	08	92002	NP INIT EX	366.	55.00	
062083	062083	BLANCHE D	01	08	76516	ULT/BID	366.	135.00	
062483	062483		01		00900	Cash	6/24/83	150.00-	
062783	062783	BLANCHE D	01	09	66980	ECCE IOL	366.	2400.00	
070183	070183		01		00901	Check	GR7L2T054	2400.00-	
070183	070183		01		00944	Refd Ins	04/50	200.00	
102683	102683	BLANCHE D	01	08	76516	ULT/BID	366. V43.1	135.00	
112183	112183	BLANCHE D	01	08	90050	DP LTD OV	366. V43.1 372.72	30.00	
120183	120183	BLANCHE D	01	09	66980-70	ECCE IOL	366. V43.1	2400.00	
120583	120583		01		00901	Check	GR3G12003	2400.00-	
120983	120983		01		00908	Ins Pymt	BIOMTRY	10.75-	
120983	120983		01		00967	Ins NoAlow	BIOMTRY	43.75-	
						Ending Balance.....		*0.00	

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FROM THE MERIT SYSTEMS PROTECTION BOARD

JOHN MURCKO
Attorney at Law
436 Fourteenth Street (Suite 728)
Oakland, CA 94612

August 22, 1984

Samuel A. Vitaro
Presiding Official
Merit System Protection Board
525 Market Street, Suite 2800
San Francisco, CA 94106

Re: Blanche A. David v. DLA
No. SF07528410811

Dear ALJ Vitaro,

Please be advised that I am writing this letter on behalf of Ms. David. On August 22, 1984 I called the MSPB regarding the case of David v. DLA. I notified you that Ms. David was in my office and wished to retain me to represent her at the hearing scheduled for tomorrow. I notified you that she has made attempts for the last three months to obtain an attorney to represent her before the MSPB without success.

Everyone said that they do not know the procedures and could not represent her. As I explained to you, Ms. David obtained my name from Ms. Parodi one week ago. She called my offices on Monday, August 20, 1984. I returned her call today and spoke to her about it. I told her that I would represent her provided that I could obtain a continuance of the hearing from August 25, 1984 to mid-October, 1984. I am occupied until September 6, 1984 and then I will be going on vacation until September 25, 1984.

During our telephone conversation I notified you that I could not be prepared in one day to handle the case. I also told you that Ms. David was a sick woman because she has osteoporosis, asthma and a lung disorder. She appears very weak and has extreme difficulty functioning. I do not believe that she is physically or mentally capable of representing herself. You

stated that you would not grant her a continuance because the case must be done.

I spoke to counsel for DLA, Ms. Jennifer Smith who also refused to stipulate to a continuance. It is my understanding that all of the witnesses that have been subpoened are from San Mateo County. There are three witnesses.

I am asking you again please grant Ms. David a reasonable continuance so that she can have representation at the hearing. The other side has an attorney and she should have the right to have one also.

Sincerely,

John Murcko

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Mid)	2. SSN	3. Person Identifier (DoI)	4. Date of Birth
NVIO, RANCHE A	0[illegible] 12 [illegible]76		10 17 [illegible]

5. Service Preference	6. Serv. Comp. Date (Leave)	7. Tenure	8. Retirement
1—None 3—10 Pt. Disab. 5—10 Pt. Other 2—5 Pt. 4—10 Pt. Comp. 6—10 Pt./30% Comp.	04 17 [illegible]7	1	1 1-CS 3-FS 8-Other 2-FICA 4-None 6-CS Spec

9. Position Title	10. FLSA	11. Sex	12. Cov.	13. Comp. Level (Occ)
BASIC LIFE PLUS STANDARD OPTION	N E-Exempt N-Nonexempt	F	1 1-US 8-Other	0[illegible]5

14. Effective Date	15. Annuitant Indicator	16. Work Schedule	17. (Reserved for OPM Use)
12 84	9 1-Reempl Area-CS 3-RETM 5-RETM & CS 2-RETO 4-RETO & CS 9-Not Applicable	F F—Full-time P—Part-time I—Intermittent Q—FT Seasonal R—PT Seasonal J—INT Seasonal	

18-B. Nature of Action	18-A. NOAC	18-B. Nature of Action
REMOVAL		

18-D. Authority	18-C. Auth Code	18-D. Authority
5 USC 75 POSTAPPT EQ		
18-F. Authority	18-E. Auth Code	18-F. Authority

26. Position Title and Number	27. To: Position Title and Number
OCUREMENT CLERK (TYPING) 11352N00	

25. Agency and Location of Employing Office	28. Name and Location of Employing Office
ASR LOS ANGELES S ANGELES CA ASHA SAN FRANCISCO FA) COMMAND SUPP OFC CA	

19. Appropriation Code	22. Basis of Level	24. Step or Rate	25. Salary	26. Pay Basis	29. Pay Plan & Occupational Code	30. Grade or Level	31. Step or Rate	32. Salary	33. Pay Basis
401106	05	10	17566.00	PA					

34. Duty Station	35. Position Occupied	36. Appropriation Code (Optional)
SAN BRUNO CALIFORNIA	1 1-Competitive 3-SES General 2-Excepted 4-SES Career Reserved	57013200

ESS:1826 TIBURON HY, BURLINGAME,CA 94010
P-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE.
ON(S) FOR REMOVAL: ACTION TAKEN IN ACCORDANCE WITH LETTER DCRL-GFB DATED 3 MAY 1984,
ECT: NOTICE OF DECISION - REMOVAL. EMPLOYEE REMOVED FOR BEING ABSENT WITHOUT LEAVE (AWOL)
E 1 DECEMBER 1983 AND FOR FAILURE TO REQUEST LEAVE IN ACCORDANCE WITH ESTABLISHED
EDURES.
ISSUED.

32. Approving Official	33. Date	38. FPMIS Data				
LIAM PERSONNEL OFFICER	05 29 84	A. Sign or Reason Int. G	B. VEV IND	C. PRO C	D. Barg. Unit Status [illegible]	E. Functional Class [illegible]
34/Authentication of Approving Official		F. Ed. Level 02 12	G. Year Degree Attained	H. Academic Discipline	I. Agency Code [illegible]37	
[illegible]ANCO J. ER, JR., DIRECTOR, PERSONNEL BASE LOGISTICS AGENCY		J. Location Code 0A322(0[illegible]1			K. SON [illegible]184	
		[redacted]	N.	O.	P	Q.

3 - Personnel Folder Copy

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